



POLICE DEPARTMENT

In the Matter of the Disciplinary Proceedings : X

- against - : FINAL

Detective Adolph Osback : ORDER

Tax Registry No.927305 : OF

Military & Extended Leave Desk : DISMISSAL

X

Detective Adolph Osback, Tax Registry No. 927305, Shield No. 4921, Social Security No. ending in [REDACTED], having been served with written notice, has been tried on written Charges and Specifications numbered 2010-2753 & 2010 3188, as set forth on form P.D. 468-121, dated March 3, 2010 and November 30, 2010, and after a review of the entire record, has been found Guilty of Specifications 2 & 3 and Not Guilty of 1 & 4 in Case No. 2010-2753 and in Case No. 2010-3188 has been found Guilty of Specifications 1, 4-16 and Not Guilty of Specifications 2 & 3.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Detective Adolph Osback from the Police Service of the City of New York.

A handwritten signature in black ink, appearing to read "William J. Bratton".
WILLIAM J. BRATTON
POLICE COMMISSIONER

EFFECTIVE: 0001 hrs. September 21, 2015



POLICE DEPARTMENT

July 29, 2015

-----X-----
In the Matter of the Charges and Specifications : Case Nos.
- against - : 2010-2753 & 2010-3188
Detective Adolph Osback :
Tax Registry No. 927305 :
Military & Extended Leave Desk :
-----X-----
At: Police Headquarters
One Police Plaza
New York, New York 10038
Before: Honorable David S. Weisel
Deputy Commissioner - Trials

A P P E A R A N C E:

For the Department: David Green, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent: Damien M. Brown, PLLC
26 Court Street, Suite 808
Brooklyn, NY 11242

To:

HONORABLE WILLIAM J. BRATTON
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

The above-named member of the Department appeared before the Court on August 22, October 22, and December 10, 2013; February 20-21, May 12, July 31, August 22, August 25, November 5, November 7, and November 10, 2014; and January 13-15, March 5, March 13, March 16, March 30, and April 3, 2015, charged with the following:

Disciplinary Case No. 2010-2753

1. Said Detective Adolph Osback, while assigned to Narcotics Borough Queens North, on or about August 28, 2008, while off-duty, did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Detective, with intent to defraud, wrongfully made or caused a false entry in the business records of an enterprise, in that said Detective executed a credit application in the purchase of a motor vehicle for [REDACTED] which fraudulently represented that a partial cash payment was made, in order for said Detective's [REDACTED] to qualify for a purchasing loan.

P.G. 203-10, Page 1, Paragraph 5 – PERFORMANCE ON DUTY –
PROHIBITED CONDUCT – GENERAL REGULATIONS
Penal Law 175.05 (1) – FALSIFYING BUSINESS RECORDS
IN THE SECOND DEGREE

2. Said Detective Adolph Osback, while assigned to Narcotics Borough Queens North, on or about September 16, 2008, while on-duty, did wrongfully and without just cause utilize one or more Department computers to make or to cause to be made inquiries unrelated to the official business of the Department or the City of New York, in that said Detective made or caused to be made unauthorized inquiries related to a member of said Detective's family on the Department's BADS or other computer system.

P.G. 203-06, Page 1, Paragraph 15 – PERFORMANCE ON DUTY –
PROHIBITED CONDUCT – GENERAL REGULATIONS

P.G. 219-14, Page 1, Paragraph 2 – DEPARTMENT COMPUTER SYSTEMS
DEPARTMENT PROPERTY

3. Said Detective Adolph Osback, while assigned to Narcotics Borough Queens North or Housing Borough - Brooklyn, on or about and between September 16, 2008 and November 13, 2009, knowingly associated with a person reasonably believed to be engaged in, likely to engage in, or to have engaged in criminal activities, in that said Detective maintained a social and financial relationship with an individual who had been arrested for and convicted of one or more crimes in New York.

P.G. 203-10, Page 1, Paragraph 2(c) – PUBLIC CONTACT - PROHIBITED CONDUCT
GENERAL REGULATIONS

4. Said Detective Adolph Osback, while assigned to the Police Academy, the 79th Precinct, the Narcotics Division, Narcotics Borough Brooklyn South, Narcotics Borough Queens North, or Housing Borough - Brooklyn, on or about and between September 29, 2000 and April 29, 2009, having acquired or otherwise owned three (3) firearms, wrongfully did fail and neglect to report said firearms acquisition to the Department, as required.

P.G. 204-10, Page 1, Paragraphs 6-9 – PISTOL PURCHASE
UNIFORMS AND EQUIPMENT

Disciplinary Case No. 2010-3188

1. Said Detective Adolph Osback, while assigned to the Narcotics Borough Queens North, on or about August 24, 2007, in Queens County, intentionally made a false statement which he did not believe to be true while giving testimony under oath in a proceeding before a grand jury, and said statement was material to the action or proceeding in which it was made.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS
Penal Law 210.15 – PERJURY IN THE FIRST DEGREE

2. Said Detective Adolph Osback, while assigned to the Narcotics Borough Brooklyn South, on or about November 19, 2005, in Kings County, knowing that written instruments, to wit Department arrest paperwork, filed with the New York City Police Department, contained a false statement or false information and with intent to defraud the state or a political subdivision thereof, offered or presented said paperwork to a public office or public servant with the knowledge or belief that it would be filed or otherwise registered or recorded in or otherwise become the records of such public office or public servant.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS
Penal Law 175.35 – OFFERING A FALSE INSTRUMENT FOR FILING
IN THE FIRST DEGREE

3. Said Detective Adolph Osback, while assigned to the Narcotics Borough Brooklyn South, on or about November 19, 2005, in Kings County, with the intent to defraud, made or caused to be made false entries in the business records of an enterprise, and the intent to defraud included an intent to commit another crime, to wit offering a false instrument for filing or to aid or conceal the commission thereof.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS
Penal Law 175.10 – FALSIFYING BUSINESS RECORDS IN THE FIRST DEGREE

4. Said Detective Adolph Osback, while assigned to the Narcotics Borough Queens North, on or about January 13, 2006, in Queens County, knowing that written instruments, to wit Department arrest paperwork, filed with the New York City Police Department, contained a false

statement or false information and with intent to defraud the state or a political subdivision thereof, offered or presented said paperwork to a public office or public servant with the knowledge or belief that it would be filed or otherwise registered or recorded in or otherwise become the records of such public office or public servant.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS

Penal Law 175.35 – OFFERING A FALSE INSTRUMENT FOR FILING
IN THE FIRST DEGREE

5. Said Detective Adolph Osback, while assigned to the Narcotics Borough Queens North, on or about January 13, 2006, in Queens County, with the intent to defraud, made or caused to be made false entries in the business records of an enterprise, and the intent to defraud included an intent to commit another crime, to wit offering a false instrument for filing or to aid or conceal the commission thereof.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS

Penal Law 175.10 – FALSIFYING BUSINESS RECORDS IN THE FIRST DEGREE

6. Said Detective Adolph Osback, while assigned to the Narcotics Borough Queens North, on or about January 13, 2006, in Queens County, being a public servant, with intent to obtain a benefit or deprive another person of a benefit, committed an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act was unauthorized.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS

Penal Law 195.00 (1) – OFFICIAL MISCONDUCT

7. Said Detective Adolph Osback, while assigned to the Narcotics Borough Queens North, on or about January 13, 2006, in Queens County, wrongfully restrained a person or persons known to the Department.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS

Penal Law 135.05 – UNLAWFUL IMPRISONMENT

8. Said Detective Adolph Osback, while assigned to the Narcotics Borough Queens North, on or about January 13, 2006, in Queens County, subscribed a written instrument, to wit a corroborating affidavit, knowing that it contained a statement which was in fact false and which said Detective did not believe to be true, and said Detective intended and believed that such instrument would be uttered and delivered with a jurat affixed thereto, and such instrument was uttered and delivered with such jurat affixed thereto.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS

**Penal Law 210.35 – MAKING AN APPARENTLY SWORN FALSE STATEMENT IN
THE SECOND DEGREE**

9. Said Detective Adolph Osback, while assigned to the Narcotics Borough Queens North, on or about May 26, 2007, in Queens County, knowing that written instruments, to wit Department arrest paperwork, filed with the New York City Police Department, contained a false statement or false information and with intent to defraud the state or a political subdivision thereof, offered or presented said paperwork to a public office or public servant with the knowledge or belief that it would be filed or otherwise registered or recorded in or otherwise become the records of such public office or public servant.

**P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS**

**Penal Law 175.35 – OFFERING A FALSE INSTRUMENT FOR FILING
IN THE FIRST DEGREE**

10. Said Detective Adolph Osback, while assigned to the Narcotics Borough Queens North, on or about May 26, 2007, in Queens County, with the intent to defraud, made or caused to be made false entries in the business records of an enterprise, and the intent to defraud included an intent to commit another crime, to wit offering a false instrument for filing or to aid or conceal the commission thereof.

**P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS**

Penal Law 175.10 – FALSIFYING BUSINESS RECORDS IN THE FIRST DEGREE

11. Said Detective Adolph Osback, while assigned to the Narcotics Borough Queens North, on or about May 26, 2007, in Queens County, wrongfully restrained a person or persons known to the Department.

**P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS**

Penal Law 135.05 – UNLAWFUL IMPRISONMENT

12. Said Detective Adolph Osback, while assigned to the Narcotics Borough Queens North, on or about May 26, 2007, in Queens County, being a public servant, with intent to obtain a benefit or deprive another person of a benefit, committed an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act was unauthorized.

**P.G. 203 10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS**

Penal Law 195.00 – OFFICIAL MISCONDUCT

13. Said Detective Adolph Osback, while assigned to the Narcotics Borough Queens North, on or about May 31, 2007, in Queens County, knowing that written instruments, to wit Department arrest paperwork, filed with the New York City Police Department, contained a false

statement or false information and with intent to defraud the state or a political subdivision thereof, offered or presented said paperwork to a public office or public servant with the knowledge or belief that it would be filed or otherwise registered or recorded in or otherwise become the records of such public office or public servant.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS
Penal Law 175.35 – OFFERING A FALSE INSTRUMENT FOR FILING
IN THE FIRST DEGREE

14. Said Detective Adolph Osback, while assigned to the Narcotics Borough Queens North, on or about May 31, 2007, in Queens County, with the intent to defraud, made or caused to be made false entries in the business records of an enterprise, and the intent to defraud included an intent to commit another crime, to wit offering a false instrument for filing or to aid or conceal the commission thereof.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS
Penal Law 175.10 – FALSIFYING BUSINESS RECORDS IN THE FIRST DEGREE

15. Said Detective Adolph Osback, while assigned to the Narcotics Borough Queens North, on or about May 31, 2007, in Queens County, wrongfully restrained a person or persons known to the Department.

P.G. 203 10, Page 1, Paragraph 5 PUBLIC CONTACT PROHIBITED CONDUCT
GENERAL REGULATIONS
Penal Law 135.05 UNLAWFUL IMPRISONMENT

16. Said Detective Adolph Osback, while assigned to the Narcotics Borough Queens North, on or about May 31, 2007, in Queens County, being a public servant, with intent to obtain a benefit or deprive another person of a benefit, committed an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act was unauthorized.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS
Penal Law 195.00 – OFFICIAL MISCONDUCT

The Department was represented by David H. Green, Esq., Department Advocate's Office. Respondent was represented by Damien M. Brown, Esq., Law Office of Damien M. Brown PLLC.

Respondent pleaded Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

In Case No. 2010-2753, Respondent is found Guilty of Specification Nos. 2 & 3, and Not Guilty of Specification Nos. 1 & 4. In Case No. 2010-3188, Respondent is found Guilty of Specification Nos. 1 & 4-16, and Not Guilty of Specification Nos. 2 & 3.

Case No. 2010-3188

Introduction

Respondent was an undercover officer assigned to the Narcotics Division. He first worked in Narcotics Borough Brooklyn South before transferring to Narcotics Borough Queens in early 2006. For the incidents in question, Respondent was the primary undercover, working with a ghost.

The case against Respondent involves four short-term buy-and bust street operations. The allegations are that Respondent "flaked" several individuals, meaning that he fabricated the sale of drugs by various individuals to him. He allegedly did this by lying about the circumstances of his actual interactions with these individuals. According to the Department, Respondent would state that the person sold drugs to him, but then voucher narcotics from his own stash or from other recovered, non-voucher narcotics. He also allegedly staged a scenario so that an individual would pick up prerecorded buy money under what he thought were innocent circumstances. Respondent's case was one of several recent cases of alleged corruption in narcotics teams.

The evidence in the case included statements and testimony from the individuals arrested in the buy-and-busts, as well as testimony from the ghost undercover officers that accompanied Respondent. Central in this regard was former Detective Stephen Anderson. Anderson was Respondent's ghost for three of the buy-and-bust operations that resulted in alleged false arrests. Anderson and Respondent met when Anderson was doing undercover training in Brooklyn South, with Respondent accompanying Anderson on his first buy. They worked together a few more times in Brooklyn before transferring to Queens Narcotics at the same time. In Queens, they worked together more steadily within the same pool of undercovers, although they were not partners.

Anderson admitted to being involved in drug flaking while working in Queens. On January 5, 2008, he went to the Delicias de Mi Tierra bar with Police Officers Alan Figueroa and Henry Tavarez (Tr. 264-70, 403-08, 1623-32). Anderson purchased three glassines of cocaine but allowed Tavarez, a newer undercover officer that had not made many buys, to take credit for two glassines. Four individuals who were not involved in narcotics sales were arrested, but security camera footage from the bar confirmed their innocence.

Both Tavarez and Anderson pleaded guilty in criminal court to felonies in exchange for reduced sentences. Anderson pleaded to criminal sale of a controlled substance in the third degree. He testified before this tribunal pursuant to a cooperation agreement with the Queens County District Attorney's Office. He will have testified at several criminal and administrative police corruption proceedings before the conclusion of that agreement. Figueroa was terminated from the Department after a Departmental trial (*Case No. 2009-0545* [Sept. 21, 2012]).

Detective Charles Fico, Respondent's ghost for the fourth buy-and-bust, also testified. Both Anderson and Fico asserted that they never observed Respondent sell drugs or exchange anything criminal with the individuals who were ultimately arrested.

The specifications covering the four incidents were similar: falsifying Department arrest paperwork with intent to defraud; making false entries in Department business records with intent to defraud; unlawful imprisonment; false criminal complaints; perjurious grand jury testimony; and official misconduct.

The basis for most of the charges is clear. With respect to official misconduct, it should be noted that the Department was required to prove Respondent intended to obtain a benefit or deprive another person of a benefit by making false arrests. The benefit, for purposes of the official misconduct Penal Law statute used to charge Respondent (Penal Law § 195.00 [1]), does not necessarily have to be monetary and can be of an intangible nature. See People v. Feerick, 93 N.Y.2d 433, 448-49 (1993) (benefit was retrieval of lost police radio that had been left at narcotics-associated apartment); Matter of Conde v. Kelly, 118 A.D.3d 534, 535 (1st Dept. 2014) (officer intended to obtain benefit for fellow officer and friend by accessing confidential information from IAB computer system to confirm for the friend the disciplinary allegations against him).

Respondent testified that he had no motive to accuse the individuals falsely because he would gain no benefit by it. This is not credible, however, in light of long experience within the Department by which officers with excellent arrest records are afforded more opportunities for advancement. As noted infra (discussion of Respondent's alleged Lack of Motive), there was testimony from other Narcotics Division witnesses, including on Respondent's own case, contradicting Respondent's claim. Additionally on Respondent's own case, he submitted the memorandum of his commanding officer at Queens Narcotics recommending him for promotion to second-grade detective (Respondent's Exhibit [RX] E). The '49' listed several operations in which Respondent took part, and highlighted the many buys he made. Respondent introduced the memo to demonstrate the many commendations he had received in his career (Tr. 2096-99).

Thus, the Court finds that the benefit Respondent would have received for the purposes of official misconduct, if he did arrest people falsely, was to make more arrests and improve his performance as an undercover officer.

It also was necessary for the Department to prove that Respondent knew the false arrests constituted an unauthorized exercise of his official function. It cannot reasonably be asserted otherwise.

Specification Nos. 2 & 3 – November 19, 2005

Facts

These charges arise out of events surrounding the arrest of **Person A** on November 19, 2005. It was undisputed that Respondent and Anderson, then assigned to Brooklyn South, arrived at a bodega on Flatbush Avenue at approximately 1825 hours (Tr. 460, 1096). The bodega was owned by Eduardo Urena (Tr. 561). Several signs advertising sales and specials hung in the windows (Tr. 470, 590; RX B, photographs). The door was propped open that evening (Tr. 469, 601). There was a kite at the location due to prior narcotics complaints. Still, Anderson had tried to purchase drugs at the bodega the previous week but was unsuccessful. Thus it was decided that Respondent would serve as the primary undercover and Anderson as the ghost (Tr. 286, 1935).

Respondent, after a few minutes, purchased a drink and then exited the store. He gave a positive buy sign and radioed the field team to describe the participants in the sale. Person A, who resided above the bodega, was arrested. Respondent identified Person A to the field team a few moments after he was apprehended. The other individual that Respondent described over the radio never was found and deemed a lost subject (Tr. 288, 291, 467, 561-63, 1942-47;

Department's Exhibit [DX] 10, IAB interview of Person A). Person A died approximately a year or two after his arrest.

Findings and Analysis

The accounts of Respondent, Anderson and Urena differed in significant ways as to what transpired in the bodega. Respondent stated in the buy report (DX 5a) that he entered the store and engaged in a "narcotics related conversation" with the lost subject, whom he labeled JD 'Blue.' He asked 'Blue' for a "twenty of coke," at which time 'Blue' then looked toward JD 'Beige,' who later was identified as Person A. 'Blue' asked Person A if he knew Respondent, to which Person A replied, "Yes he's good." Respondent handed 'Blue' \$20 of prerecorded buy money, and in exchange was given a small ziplock bag containing what was believed to be cocaine. Respondent then left and informed the field team of the events.

Respondent testified on direct examination that he first spoke with Person A inside the store and eventually asked him for cocaine. They went outside the store to see if anyone was around and saw JD 'Blue.' Respondent testified that he went back in the store with the two men, at which point 'Blue' asked Person A if Respondent was "good." After Person A affirmed that he was, Respondent gave 'Blue' \$20 and received the bag of cocaine. Respondent stated that no exchange or transfer occurred with Person A directly and that 'Blue' immediately left on a bicycle. Respondent described Person A to the field team as part of the deal because he "facilitated" the transaction with 'Blue.' He did not notice Anderson standing outside the doorway at any point (Tr. 1942, 1944, 1952).

Respondent never alleged that either individual he described to the field team was behind the counter or acting as the cashier at any point (Tr. 1948, 1952). Urena, the store owner, agreed that Person A was not, at any point that day, behind the counter or acting as cashier. While

Urena admitted that Person A sometimes watched the store if he needed a short break or to go the back room, he stated he took no such breaks that day. Person A, Urena recalled, was sitting on a milk crate to the left of the counter that evening. Urena acknowledged that a few weeks before, an individual was arrested outside the store for a narcotics sale and that police officers had questioned Urena following that arrest (Tr. 565, 568-69, 592, 595-97, 614-16).

Person A passed away prior to trial but was interviewed by IAB investigators on January 29, 2010. His responses were largely consistent with the testimony of Urena. Person A stated that he was sitting on the left side of the counter in the corner, hanging out with Urena, who was behind the counter. He insisted that he spoke to no one else in the store that day and did not sell drugs that day or any other day. Person A did not make a complaint about what he considered to be a false arrest because his son was applying to be a police officer and he did not want to create any trouble for him (DX 10 at pp. 7, 9-10, 13, 16). Urena stated that Person A told him the same following the arrest (Tr. 568).

Anderson's account differed significantly. He identified Person A as the cashier, behind the counter. Anderson stated that he stood about ten feet back from the door, which was propped open, allowing him to see inside the store. He testified that he never lost visual contact of Respondent, observing him select a drink, pay for it with cash and exit the store without interacting with any individual other than the cashier, or purchasing any drugs (Tr. 287-90, 465, 468-69).

Anderson said that although he knew Respondent had not made a drug purchase, he did not report it to any supervisors or attempt to discuss the situation with Respondent. He was concerned about being labeled as someone whom no one wanted to work with and felt it would violate the camaraderie and loyalty among the undercovers (Tr. 292-93).

No evidence exactly established Anderson's vantage point from where he was standing, and how wide the door was propped open. As such, there was no way to discern exactly what he was able to see or if his view of Respondent was obstructed in any way. It is possible that Anderson never lost visual contact of Respondent, but also might not have been able to see a hand to hand transaction.

Additionally, while Anderson, Urena and Person A all agreed that no drug deal took place, Anderson was adamant that Person A was behind the counter. Urena's testimony and Person A's interview, however, were consistent with Respondent's assertion that Person A was never behind the counter at any point. This inconsistency cuts at the heart of Anderson's allegation that Respondent falsely accused the cashier of selling drugs. Moreover, Urena and Person A had no motive to agree with Respondent, who they both believed to have accused Person A falsely of selling narcotics.

With Anderson's account differing from that of Urena and Person A on such a critical fact, the Court finds that the Department failed to meet its burden of proving that Respondent lied about selling Person A drugs and falsified Department paperwork in support of that lie. Therefore, Respondent is found Not Guilty of these two specifications.

Specification Nos. 4-8 – January 13, 2006Facts

Specification Nos. 4-8 involve the arrests of **David Saez and Person B** in Queens County on January 13, 2006. The pair were childhood friends that grew up in the same neighborhood in Queens (Tr. 902; transcript of Person B [REDACTED] [DX 9] at p.6). Having both been released from prison recently, they made plans to get together with friends that evening. Saez arrived at Person B's apartment and Person B asked him to walk with him to his girlfriend's house at [REDACTED] to pick up laundry (Tr. 902-04).

When they arrived at the building, however, Person B did not invite Saez up to his girlfriend's apartment (Tr. 907; DX 9 at p. 9). Security camera footage captured Saez and Person B entering what appeared to be an entry vestibule at 2036 hours and proceeding into the lobby at 2037. Person B turned to say something to Saez and then walked past him. Additional footage showed Person B in the elevator seconds later. Saez walked in a circle around the lobby and then was seen exiting the vestibule at 2038 (DX 1, surveillance video). Saez testified that he decided to wait outside because it was hot in the lobby (Tr. 907).

Respondent and Fico were the assigned undercover officers on the set in question. Fico typically served as an investigator but acted as a ghost on this date because the team was short undercovers. Fico parked the vehicle on [REDACTED] Boulevard at approximately 2030 hours and remained inside while Respondent approached Person B's girlfriend's apartment building (Tr. 151, 153, 1965).

The building was shaped like an "H" or hard "U". The entrance was not visible from the street; there was an open walkway with a ramp leading to the door in what would be the bottom of the "U" or cross of the "H." On the other side, there was a set of steps leading to the building superintendent's office or apartment (Tr. 156-57, 905, 909). The video depicted Saez sitting on

these steps beginning at 2039 hours. At 2043 hours, the video showed Respondent walking up to Saez and engaging him in conversation for approximately eight to nine seconds. Respondent's hands definitely were in his jacket pockets the entire time. As they spoke, Person B walked up behind Saez from the other direction, holding a shopping bag. He did not interact with Respondent. Respondent then walked past Person B and Saez, who both began walking off camera in the other direction. Respondent lingered for about two seconds and then turned to follow behind them (DX 1). During this time, Respondent was out of Fico's visual contact (Tr. 160-61).

Fico then observed Person B and Saez turn right onto Northern Boulevard (Tr. 160). Person B and Saez were unaware that Respondent was behind them (Tr. 917; DX 9 at p. 12). Respondent indicated a positive buy and Fico notified the field team (Tr. 161-62).

Saez and Person B continued walking back toward Person B's apartment until they were arrested at approximately 2055 hours (DX 3, buy report; Tr. 162, 918-19). No prerecorded buy money or stash was recovered from either Person B or Saez (Tr. 167, 1990).

Respondent filled out the arrest paperwork more than two hours later (Tr. 1995-97). His buy report listed the location of the buy as "I/O" – inside of – the building, specifically noting that it was the "Lobby." Respondent wrote that he approached JD 'Teardrop' (Saez) and asked him for a bag of 'soft.' Saez turned to JD 'Brown Boots' (Person B) and told him to "watch the door." Respondent handed Saez \$20 of ~~p~~rerecorded buy money in exchange for a clear ziplock of what was believed to be cocaine.

Video footage from the apartment building subsequently was obtained by Person B's attorney (DX 9 at p. 28; RX G, transcript of Queens Assistant District Attorney Z [REDACTED] at pp. 96-97). ADA Z contacted Respondent and informed him that the video did not show a buy taking place in the lobby. Respondent told [REDACTED]

ADA Z that he had made a mistake with the paperwork as the buy really had occurred outside. ADA Z told Respondent that this would cause problems with the case but did not report the error to IAB. Respondent was not disciplined for the error but simply was reminded by a supervisor to be more careful in the future (Tr. 1998-2001, 2003; RX G at pp. 98-99, 112).

The People first offered Saez and Person B an Adjournment in Contemplation of Dismissal (ACD), which they refused. Ultimately, however, the cases were dismissed in the interest of justice upon the People's motion (RX G at p. 100). Saez filed a lawsuit, which was settled for \$20,000 without the City admitting liability (Tr. 929-30).

Findings and Analysis

Respondent's account of the events of January 13, 2006, was not supported by the testimony of Fico, Saez, Person B, or the video evidence. Respondent testified that he walked up to the apartment building and noticed Saez sitting outside on the steps. He asked Saez for a bag of cocaine. At the same time Person B was coming out of the building and Saez instructed him, "watch the door." Respondent thought he and Saez would go into the lobby, but instead Person B walked past him, so Respondent followed the pair around the building. He alleged that once they turned the corner, Saez gave him a bag of cocaine. Saez and Person B then crossed the street and headed toward a gas station (Tr. 1979-80, 1986).

Respondent contended that he made a mistake on his paperwork and wrote that the buy took place in the lobby. While he stated that he did not know exactly how or why he made the mistake, he suggested that it might have been a copy-and-paste error from a prior buy report, or just that he got confused when filling out the paperwork over two hours later because he had walked toward the lobby door at one point (Tr. 1974, 1995-99).

Saez and Person B provided an entirely different account. Saez testified that Respondent approached him while he sat on the steps and asked where he could find weed. He said he wished he could help Respondent but was not from the area, so Respondent walked off (Tr. 910-13).

Person B's prior testimony echoed that of Saez. He stated that as he came out the door, he saw Saez sitting on the stairs talking to Respondent, who appeared to have just approached him. Respondent walked away after a few seconds, and Saez and Person B walked back toward his apartment. They were apprehended by police after walking about four blocks (DX 9 at pp. 11-13).

Fico testified that he was not able to see Respondent approach Saez on the steps, but observed Saez and Person B as they turned right at the corner and walked off together. He noted that at one point, he had to look over his shoulder to watch them (Tr. 159 60, 179-80). Fico did not observe Respondent purchase narcotics (Tr. 161). Fico thought that Respondent made a buy because he appeared to be heading inside the apartment building when he exited Fico's visual contact and then subsequently gave a positive buy sign (Tr. 201, 213).

The video evidence supports the testimony of Saez and Person B. Just as they testified, Respondent approached Saez outside the entrance to the building and engaged him in conversation for about ten seconds. No drugs were exchanged and the video showed that Respondent's hands were in his pockets the entire time. Respondent walked past Saez, lingered for a few seconds as Saez and Person B departed in the other direction, and then turned around and followed them out of the camera's view.

Respondent consistently maintained that the buy did not take place in the lobby, as he noted in the buy report purportedly by mistake. Instead, he testified that the buy actually took place after they turned the corner away from the building and out of the camera's view. But this

could not be true because Fico watched from his vehicle across the street and did not observe any sale or exchange once the three turned the corner. Fico is not alleged to have been involved in illegal activity and he had no visible motive to lie concerning Respondent. There is no reason to question his credibility.

Saez's and Person B's criminal histories (see Respondent's Summation [RS] at pp. 4-5) thus actually work against Respondent. Saez was incarcerated at the time of his testimony and was produced from Rikers Island. His criminal record included multiple convictions for possession of a controlled substance, and robbery and assault, including assault of a police officer in 2007 (Tr. 890-99, 963-64). He testified at great length about his various crimes and candidly admitted that he facilitated drug sales to help feed his own habit and continued to do so presently (Tr. 946, 963-64, 979-80). Person B was similarly forthcoming in Respondent's criminal case. He admitted to four convictions for cocaine possession, two of which were pleaded down from criminal sale, and further agreed that he had sold drugs on other occasions and not been arrested (DX 9 at pp. 3-6, 30-43). As a whole, this suggests that Respondent accurately selected persons that might sell drugs, but in fact no sale took place.

The Court is not persuaded by Respondent's highly speculative argument that if Respondent was lying about purchasing drugs, there would have been no reason to put himself in harm's way by following Person B and Saez, the latter of whom Respondent believed was a possible gang member due to his teardrop tattoo (Tr. 1985). Instead, it would have been easier to state that a buy took place in the lobby rather than risk following them (RS at pp. 6-7). But the video shows Respondent lagging behind them, in public, and Saez and Person B both testified that they did not notice Respondent behind them (Tr. 917; DX 9 at pp. 11-12). Further, this tribunal is unwilling to engage in an analysis of which lie would have been more feasible. The Court also discounts counsel's speculation that Person B warned Saez of cameras and moved with

Respondent out of the camera's view to make the sale (RS at p. 8). Neither the video evidence nor any other evidence supports this theory.

In sum, the security camera footage showed that Respondent never entered the building and that no sale or exchange occurred when he engaged Saez on the steps. Further, Fico's testimony demonstrated that no sale took place in the part of the building property leading to the street but out of the camera's view. As such, this tribunal finds that Saez and Person B did not sell Respondent cocaine on January 13, 2006, just as they testified, and thus that Respondent made false statements when he indicated that a buy had occurred and continued to lie in his corresponding paperwork. Respondent thus is found Guilty of Specification No. 4, offering arrest paperwork with false statements for filing; Specification No. 5, making false entries in Department business records; Specification No. 6, official misconduct; Specification No. 7, unlawful imprisonment, and Specification No. 8, knowingly submitting a corroborating affidavit containing false statements.

Specification Nos. 1 & 9-12 – May 26, 2007

These specifications involve Respondent's interaction with **Xing Min Zhuang** on May 25, 2007, and Zhuang's subsequent arrest. Respondent and Anderson worked undercover in Zhuang's neighborhood in Queens County on that evening. Anderson asserted that the neighborhood was "drug-prone"; Respondent stated that there had been multiple complaints about drug sales at [REDACTED] bar at 82nd Street and Roosevelt Avenue (Tr. 298, 2022). Respondent acted as the primary undercover and Anderson as the ghost (Tr. 504).

Zhuang was a 56-year-old hotel laundry worker and an immigrant from China. He testified through a Mandarin interpreter. Prior to May 26, 2007, Zhuang never had been arrested and had no criminal record (Tr. 40-41).

After returning home from work on May 25, 2007, Zhuang left his basement apartment around 2300 hours to get a soda from a nearby deli. He was approached by Respondent, who first asked if he was Chinese and then asked him for crack cocaine. Zhuang acknowledged that he told Respondent people often asked that question in that neighborhood. Zhuang asked why Respondent liked drugs and Respondent replied that he had "crazy sex" with two girlfriends while high. At some point, the two separated, and then later came back together before separating again (Tr. 42-45, 48, 67, 78, 2023-29). During this time, Anderson was located about half a block back across the street and Respondent recalled observing Anderson across the street at one point during his interaction with Zhuang (Tr. 299, 302, 2028).

After Zhuang and Respondent broke apart for the second time, Respondent gave a positive buy sign (Tr. 505; DX 11, Respondent's grand jury testimony against Zhuang, at p. 7). Both Respondent and Anderson radioed the field team with a description. Zhuang was arrested a few moments later and Respondent made a confirmatory identification to the field team (Tr. 80-81; DX 11 at pp.7 8).

Respondent prepared a buy report, where he stated that he approached JD 'Chino' (Zhuang) and engaged him in conversation and asked for crack. They walked to the corner, where he handed Zhuang \$20 of prerecorded buy money. Zhuang told him to wait and turned the corner. He returned shortly and placed a blue ziplock of what was believed to be crack cocaine in his hand (see DX 6a, buy report). The property clerk's invoice (DX 6c) noted the vouchering of a blue ziplock of crack that was recovered during a buy-and bust operation on May 25, 2007. No prerecorded buy money or stash was recovered from Zhuang.

Respondent and Anderson agreed that they did not plan together to "flake" Zhuang and that they did not discuss Zhuang's arrest at any point after the arrest or prior to the grand jury proceeding (Tr. 437-38, 504, 511, 2032). Both detectives spoke with the ADA regarding

Zhuang's case and both testified before the grand jury that Zhuang went in between buildings and or into a building and returned with drugs that he gave to Respondent (Tr. 509-10, 2030-32). Respondent testified that he told the ADA that he believed Zhuang was only a "facilitator" and "not really a drug dealer" (Tr. 2032).

Zhuang was charged with sale of a controlled substance but ultimately pleaded guilty to disorderly conduct (Tr. 48-51, 2032; RX G, transcript of Queens Assistant District Attorney [REDACTED] at p. 121). The ADA explained that Zhuang's age, lack of criminal history, the fact that no drugs or buy money were recovered from him, and Respondent's statements about Zhuang merely being a facilitator, were factors in the decision to offer him the violation. Zhuang also testified before the grand jury (RX G at pp. 127-30).

Findings and Analysis

Respondent's testimony was largely consistent with the buy report and his grand jury testimony. He testified that he had been walking for awhile in the general area when he noticed Zhuang standing on the corner of 82nd Street and Roosevelt Avenue watching cars go by. Respondent believed [REDACTED] and thought he might be a means of gaining entry to the bar. He noted that steerers often hung around in front of a location hoping to catch buyers (Tr. 2023-24). After walking and talking with Zhuang for a few blocks, he placed prerecorded buy money into Zhuang's hands and when they reached the corner of Gleane Street and Britton Avenue, Zhuang told him to wait. Respondent asserted that Zhuang walked away, making a left in between two buildings before returning and handing Respondent the drugs (Tr. 2027-28).

Zhuang insisted that no sale or exchange of drugs occurred. He testified that Respondent, who seemed "very friendly," asked him for drugs. Zhuang left quickly and went to the deli for a

soda. He stated that he stood in front of the store pacing for awhile because it was hot out, but he had no plans to go anywhere else. But he encountered Respondent again on his walk home. Respondent said that they were neighbors and suggested they walk together. Zhuang told Respondent that drugs were "no good" and asked why he liked them. Respondent replied that they were good for sex (Tr. 43-44, 70-71, 111).

Zhuang testified that at that point, he thought Respondent was "not a good guy" and thought he might be dangerous so he told him he was going home. They separated at Gleane Street and Respondent walked in another direction. Zhuang was arrested a few minutes later (Tr. 44, 78-79).

Zhuang testified that he told his court-appointed attorney he was innocent and wanted to go to trial, but was advised to plead guilty to disorderly conduct. He asked for another attorney but was told by the judge this was not possible. He felt "forced" to accept the plea but feared risking going to jail. He adamantly insisted that he was framed and never even had seen drugs, let alone sold them (Tr. 48-49, 50-54, 101).

Like Zhuang, Anderson testified that no money or drugs were exchanged and no crime was committed. He stated that he was on the opposite side of the street walking a bit back from Respondent and Zhuang. Although he was not able to hear their conversation, he claimed that he never lost visual contact of Respondent at any point. Anderson testified that he observed Respondent and Zhuang walking and when they broke apart, Respondent gave a positive buy sign. He said that, just as with the Brooklyn bodega alleged buy (Person A), he did not confront Respondent or report the matter because he did not want to violate the loyalty and trust among the undercovers or tarnish his reputation within the group (Tr. 302-06).

Anderson contended that he used the buy report prepared by Respondent to prepare for his grand jury testimony (Tr. 504). He said that he had lied to the ADA and the grand jury about

Respondent and Zhuang touching hands and Zhuang walking off between two buildings (Tr. 509-11).

Given the conflicting testimonies of Respondent, Zhuang and Anderson, the resolution of these specifications turns wholly on witness credibility in a way that the first two incidents did not. Discernment of the truth regarding a past event on the basis of conflicting testimonial accounts is a difficult task for a finder of a fact. While the law creates the framework within which such a task is accomplished, the ultimate determination of which account to accept depends almost solely on an assessment of witness credibility. In making such an assessment, the trier of fact should consider a wide range of factors, including but not limited to, witness demeanor, corroborating evidence, the consistency of a witness account both at trial and over time, the degree to which the witness is interested in the outcome of a case, the potential prejudice or bias of the witness, and perhaps most basically the degree to which the witness accounts are logical and comport with common sense and general human experience.

Respondent's interest in the outcome of this case is huge. If he is found guilty of lying about being sold drugs and falsifying Department paperwork and later testimony in support of those lies, he will be dismissed from the Department and the reputation he has built as a 15-year member of the service will be destroyed. Thus, his motive to testify in a manner consistent with his original accounts is great.

At the same time, Anderson's credibility also must be questioned. He essentially is a convicted felon, testifying pursuant to a cooperation agreement by which he will receive a prison sentence of two to four years, as opposed to the nine years he faces otherwise, provided that he offers testimony in both criminal and administrative cases involving police corruption (Tr. 332-34, 524-25); DX 4, Anderson cooperation agreement). The sentence has been held in abeyance pending the end of all proceedings where Anderson is expected to testify. The Department freely

admitted in its summation that he is a “liar who has lied on several prior occasions to benefit himself” and further acquiesced that some of the allegations he made against former colleagues were unsubstantiated or even disproved (Department’s Summation [DS] at p. 5).

Zhuang, however, had no interaction with Anderson before or after his arrest. Zhuang had no criminal history until the arrest in question at age 56. He attempted to make complaints through his attorney asserting his innocence and contending he was framed by Respondent immediately following his arrest (Tr. 48-54). He also testified on his own behalf before the grand jury. He pleaded guilty to disorderly conduct several months later, in January 2008, on the advice of his attorney in order to dispose of the felony charge against him and only after he was about to go to trial. He stands to gain nothing from his testimony and was offered nothing in exchange. He testified in a detailed and straightforward manner, corroborating Anderson’s testimony that no drugs or money were exchanged before Zhuang and Respondent parted ways at a street corner.

Respondent argued that Zhuang was not credible because he (i) testified that he wanted to sleep after work but left his apartment to buy a Red Bull energy drink (Tr. 110 13), (ii) testified that it was too hot inside his apartment but put on a long sleeve thermal shirt to go outside; (iii) testified that the police injured his face which is not corroborated by his arrest photo; and (iv) testified in earlier proceedings that he only owned white shirts when he was arrested wearing a green shirt. These arguments are tangential, insignificant in nature and immaterial to the substantive allegations at the heart of this case. Zhuang never testified that he was going to sleep after drinking the Red Bull. He said that he either lay down for a while or took a nap after work, then got up to go out and get something to drink. People who work odd hours, like Zhuang who got home at 2200 hours, are entitled to stay up for a few hours before finally going to bed. Some people also wear long shirts on summer nights. Zhuang’s statements that he only owned white

shirts, when he was arrested in a green shirt, appear to be the result of the language barrier and confusion about what he wears to work. Finally, just because Zhuang's face did not appear injured in one photograph does not mean that it was not in fact injured. He testified that he cleaned off his face prior to the photograph. Moreover, bruising and swelling can take hours to appear.

Zhuang gave an entirely plausible account of the events preceding his arrest. His account of what happened appears to have been consistent from his very first conversation with his attorney. Having put this incident, which appeared to have distressed him greatly, behind him with a plea, there was no reason for him to subject himself to reliving these events at the Department trial, including cross examination, other than to express the truth in the interest of justice. Further, because Zhuang had no contact or relationship with Anderson prior to or after May 26, 2007, there was no opportunity to come up with corroborating stories.

Respondent's counsel argued that Anderson's testimony before the grand jury that Zhuang walked in between two buildings and then returned with drugs was "similar if not the same" to Respondent's, even though Anderson admitted that he and Respondent never discussed the events or concocted a story (RS at p. 10). As Zhuang going between two buildings was not in Respondent's buy report, counsel asserted that there was no way Anderson could come up with this detail if it did not happen.

The detail of going between two buildings, however, is not so remarkable or unique that it makes the grand jury testimony offered by Respondent and Anderson true. Anderson testified that he used the buy report to prepare his grand jury testimony. The buy report outlined that Zhuang told Respondent to wait at a street corner before returning with drugs. Anderson, an experienced undercover officer that had observed many drug buys, could have, in an attempt to bolster Respondent's statement that he waited at the corner for Zhuang to return with drugs,

stated that Zhuang had walked into a building or between buildings to get the drugs. Zhuang did not have any drugs on his person when he got arrested, so the narrative had to state that he went somewhere to retrieve what he supposedly sold to Respondent.

In sum, the tribunal finds Zhuang's testimony to be credible and corroborative of Anderson's allegations and finds that Zhuang was not involved in selling narcotics to Respondent. As such, the tribunal concludes that Respondent lied about Zhuang's drug sale and arrested him based on said lie, falsified Department records in support of that lie, and continued to lie before the grand jury. Accordingly, Respondent is found Guilty of Specification No. 1, making false statements to a grand jury; Specification No. 9, knowingly filing arrest paperwork containing false information; Specification No. 10, falsifying Department business records; Specification No. 11, unlawful imprisonment; and Specification No. 12, official misconduct.

Specification Nos. 13-16 – May 31, 2007

Facts

These specifications involve Respondent, Anderson, and **Shawn Diaz and Person C**. The following facts are undisputed. Respondent and Anderson worked on [REDACTED] A venue in Queens at about 1900 hours on May 31, 2007, as the primary and ghost undercover officers, respectively (Tr. 319, 321, 2051). The residential area was being targeted for complaints of marijuana and cocaine, and [REDACTED] was listed as a specific kite location (Tr. 320, 2059, 2063; IX 7d. tactical plan).

Respondent walked up the block with Anderson trailing about 50 feet behind him on the same side of the street. Respondent and Anderson both observed Diaz and Person C, on one side of the street and another larger group in front of the address in question (Tr. 323-26, 2067).

Anderson recalled Respondent putting over a description of the two individuals a few moments later when he turned the corner (Tr. 328). Respondent did not recall who put over the description to the field team. Person C and Diaz subsequently were arrested for the sale of heroin and Respondent made a confirmatory identification (Tr. 2074-75). Twenty dollars of prerecorded buy money was found on Person C, but no stash was found on either arrestee (Tr. 2075; DX 7b, property clerk's invoice).

Respondent prepared a buy report, where he stated that he approached JD 'Green Shirt' (Diaz) and asked for heroin. Diaz directed Respondent to JD 'Guap' (Person C). He handed Person C \$30 prerecorded buy money. Person C then entered [REDACTED] exited a short time later, and handed Respondent one glassine of what was believed to be heroin (DX 7g, buy report). Ultimately, however, the DA's Office declined to continue prosecuting the case after a few court sessions and the matter was dismissed (Tr. 654, 2076).

The accounts of the events leading up to Person C and Diaz's arrests could not be more different. Respondent testified that he approached Diaz and asked him for heroin. Diaz, he stated, signaled toward Person C, whom Respondent then handed \$30. Respondent asserted that Person C crossed the street and went up the stairs of the location, came back out and gave Respondent a glassine of heroin (Tr. 2068).

Conversely, Anderson testified that no sale of drugs occurred, as Respondent never engaged Diaz or Person C. Anderson asserted that he followed Respondent up [REDACTED] A venue and observed him drop currency on the ground as he passed Person C and Diaz. One of the individuals picked up the money. Anderson only lost visual contact of Respondent for a minute when Respondent turned the corner, and when he caught up with him. Respondent was putting over descriptions of Person C and Diaz. As with the prior two alleged false sales, Anderson testified

that he did not confront Respondent or report what he observed to anyone because he did not want to develop a reputation for reporting other undercovers (Tr. 324-30, 491, 495).

Diaz's account of what occurred leading up to his arrest lined up with that of Anderson. Diaz testified that he had just returned from the beach that evening and had his father drop him off at a deli on [REDACTED] A venue. He ran into Person C. whom he knew through a mutual friend, and they decided to go to Wendy's because the deli did not have fresh bread. They walked around the block toward the car, and stopped to say hi to their friend Individual 1 and his mother. They crossed the street to get to the car when Diaz observed Person C, who was in front of him, pick up a \$20 bill from the ground and put it in his pocket. Diaz conceded that he had not observed anyone drop the money. He stated that Person C said that he would treat them to Wendy's but as they were about to enter the car, multiple police cars arrived and arrested them both (Tr. 638, 641-48, 690, 692).

Diaz asserted that he never had sold drugs in his life and did not observe Person C or anyone else do so on that day. He nevertheless was charged with criminal sale of a controlled substance in the third degree, but the case was dismissed after a few court appearances (Tr. 647-48,654).

Person C could not be located to testify before this tribunal but he previously testified at [REDACTED] in 2012 (DX 8). His testimony there largely echoed that of Diaz in this proceeding. Person C testified that he was at a deli but decided instead to go to Wendy's with Diaz. They walked around the block to get to his car and stopped to say hello to some friends who were outside washing their motorcycles. Person C observed a \$20 bill blowing on the ground and grabbed it, shoving it in his pocket. Police cars arrived two minutes later. Person C asserted that neither he nor Diaz sold Respondent drugs. He pleaded not guilty to the felony charge, which ultimately was dismissed (DX 8 at pp. 4-6, 11, 25).

With conflicting accounts and no evidence other than the testimonies of those present, these specifications, like those involving the arrest of Zhuang, turn entirely on the credibility of the witnesses. The tribunal must weigh the same credibility factors outlined above. And the questions regarding the credibility of Anderson and Respondent remain largely the same.

Respondent's counsel raised numerous arguments regarding the accounts of Diaz, Person C and Anderson. First, counsel asserted that Diaz was not credible because he denied telling IAB that (i) he had been warned that Person C was dangerous and (ii) he feared the group of people across the street and did not want to engage them (RS at p. 11; see Tr. 638, 697-701). The IAB investigator confirmed that Diaz made these statements to him (Tr. 1127-28). On direct examination, Diaz denied ever being "warned" about Person C and stated that the group across the street included a friend and his mother so he went over to say hello. Neither of these inconsistent statements goes to the heart of the allegations – whether Diaz or Person C was involved in selling drugs to Respondent and whether there was prerecorded buy money on the ground. As to those questions, Diaz's statements were entirely consistent. For these reasons, the purportedly inconsistent statements are insignificant side issues.

Respondent's counsel next asserted that Diaz gave conflicting testimony as to where he was standing when Person C found the buy money and suggested that it is "hard to imagine" that someone would not remember what he was doing before experiencing a violation like a false arrest (RS at p.11). Diaz testified at this proceeding as to the moments before the arrest, stating that Person C "was there saying hello, talking. I said, 'Hello.' I waited. Like literally I'm right there on the same sidewalk. Once he was done, he came, all right, we out. Cross the street to the car. He goes, walks. He finds the \$20 bill" (Tr. 697). But at [REDACTED] Diaz had testified. "As we was walking around the corner to the vehicle, there was some friends . . . in front of [their] house. We stopped to say hi. I crossed the street waiting for him because I didn't

have anybody to talk to . . . I waited for [Person C] to finish" (Tr. 698). When confronted on cross examination about the difference as to whether they crossed the street together or whether Diaz crossed before Person C, Diaz explained, "I said he was there talking and I waited for him to finish. [When he finished], we crossed the street to the vehicle" (Tr. 699).

This tribunal does not find it all that incredulous that an individual, testifying about an event that occurred five years before his criminal court testimony and over seven years before his testimony before this court, might not remember a small detail like whether he waited on the same side of the street for his friend or crossed the street. His testimony is consistent as to other key facts: the plan to go to Wendy's, walking around the block to the car, waiting for Person C to finish talking with friends, and Person C finding the \$20 bill. Again, this inconsistency does not factor heavily in assessing Diaz's credibility.

Counsel next pointed to Diaz's statement that when his attorney told him that it was alleged that Person C went into a home to get Respondent drugs, Diaz assumed he meant "Individual 1's house" (Tr. 708). Counsel suggests that "the reason for his assumption is that [Diaz] was aware that Person C retrieved the heroin he sold to Det. Osback from Individual 1's house" (RS at p. 13). But it does not mean that at all. Diaz simply indicated to his attorney that the house to which the police or DA were referring had to have been Individual 1's house, the very house where Person C and Diaz stopped to say hello to their friend moments before the arrest. It does not mean that Diaz actually believed Person C retrieved heroin from there.

Counsel then asserted that Person C's and Diaz's testimony differed in that (i) Person C testified in criminal court that he and Diaz had come from the beach together while Diaz testified that he was returning from the beach with his father (RS at p. 13; see Tr. 641 & DX 8 at p. 20-21) and (ii) that Person C testified that Diaz never took out his wallet while Diaz conceded he did (RX 8 at p. 29). Diaz never actually conceded that he took out his wallet. He stated that he was

joking around that the \$20 was his and that he had to check his wallet (Tr. 644-45, 700). In fact, he specifically stated, consistent with Diaz, "No, I didn't take out my wallet" (Tr. 646). As to the beach, it could have been that Diaz, his father and Person C were all returning from the beach that evening. In any event, it again is immaterial to the moments before the arrest.

Counsel next pointed to the fact that both Person C and Diaz had criminal histories. Person C pleaded guilty to criminal possession of marijuana in the fourth degree in September 2008 and was arrested for criminal sale of a controlled substance, which was reduced by plea to seventh-degree possession in February 2009. He subsequently participated in an eleven-month drug treatment program. During the course of the program, he pleaded guilty to criminal possession of marijuana in the fifth degree in December 2009 (DX 8 at pp. 6-16, 18-19).

Diaz's criminal history included charges of petit larceny in 2005 and 2009 that were pleaded down to disorderly conduct, charges of criminal impersonation and menacing that were reduced by plea to disorderly conduct in 2008, and a guilty plea to grand larceny in 2011. Diaz acknowledged that he had made mistakes and stated that he knew stealing was wrong, declaring that he would never do it again (Tr. 662-63, 685).

Prior crimes may be introduced as evidence of a witness's propensity to lie. Here, Diaz underwent extensive questioning about his criminal record, answering questions in a straightforward, non-evasive manner. Person C did the same before the criminal court. The tribunal notes that both were last arrested about three years before their testimony. Neither had pending criminal cases. Taking all of this into account, the tribunal finds that Person C and Diaz's criminal histories are not fatal to their credibility. In fact, like the Saez-Person B matter, the facts suggested that Respondent accurately selected Diaz and Person C as persons that might sell drugs, but in fact no sale took place.

Further, this court gives little weight to counsel's argument that Diaz or Person C must have concocted a story about picking up the money because they did not immediately relay that information to the arresting officers (RS at p. 13). Diaz did in fact testify that in the prisoner van they asked why they were being arrested but were told to mind their business and shut up. He stated that at the precinct, he and Person C were angry and "knew at that time that . . . we was getting set up." Person C suggested to him that the \$20 was marked and Person C told him, "Something's wrong here." He further explained that they assumed it had to do with the \$20 because the police showed up so quickly after Person C picked it up (Tr. 648, 651, 703-05).

Respondent's counsel next argued that because perpetrators are often found to no longer be in possession of prerecorded buy money, it would have been "entirely unnecessary" for Respondent to drop the money on the ground (RS at pp. 13-14). True, but any case would be strengthened by a finding of buy money on the alleged perpetrator. That is the whole point of using buy money.

Counsel asserted that because Person C and Diaz did not see anyone drop the money, their story does not correlate with that of Anderson who testified that Respondent dropped the money as he walked past them (RS at p. 14). This is inconsequential at best. Person C and Diaz both testified that they were talking or at least congregating with a large group outside Individual 1's house. They could have failed to notice one man who walked by them while they were talking to others, unlike Anderson, who was charged with keeping a close visual of Respondent.

Finally, counsel argued that the fact the prerecorded buy money was found commingled with Person C's own money indicated Respondent was truthful (Tr. 2075-76; RX G, testimony of Queens ADA, pp. 142-43). Counsel opined that "it defies human nature to . . . rearrange your money out on the open street" but if Person C had gone inside a building, as Respondent contended, he would have had the time and cover to commingle the money (RS at p. 14). It

certainly does not defy human nature, but more importantly, Person C and Diaz both testified that Person C quickly stuffed the money in his pocket. It was commingled from the beginning. At no point did any one testify that he stood on the street rearranging his money in plain sight. It is entirely plausible that a \$20 bill stuffed quickly into a pocket would end up commingled with other money in that pocket.

Moreover, Respondent testified and wrote in the buy report that he gave Person C \$30 of buy money. But only \$20 was recovered from Person C. Respondent explained this by saying that the glassine of heroin cost \$ 10 and Person C kept the rest as a gratuity, perhaps to buy drugs of his own. This does not explain, however, why Respondent gave a \$10 and a \$20 to Person C when \$10 would have sufficed. The circumstances as a whole cast doubt on Respondent's assertion that Person C, who knew the system as he had gotten arrested many times for drug dealing, got rid of only a third of the buy money, leaving himself to be arrested with the remainder.

Counsel further noted that Person C's shirt was emblazoned with the word "Guap," which he said was slang for "ill gotten money" (Diaz only testified that it was slang for money [Tr. 704]) (RS at p. 14). It is, in any event, of no probative value in light of Person C's admission to other drug sales. What matters is what happened on this date.

All of these summation arguments cannot explain the most damning aspect –how Anderson, who Respondent testified had no connection to Diaz or Person C, made allegations so strikingly similar to the arrestees' accounts. Diaz, Person C and Anderson provided essentially the same account of what happened, with one particularly unique fact –the prerecorded buy money on the ground –in common. Respondent, on the other hand, offered no tangible evidence in support of his own account.

Thus, the Court finds that the Department proved by a preponderance of the credible evidence that Respondent arrested Diaz and Person C based upon a lie that they sold him narcotics.

and that he falsified arrest paperwork and other Department records in support of that lie. Accordingly, Respondent is found Guilty of Specification No. 13, falsifying arrest paperwork; Specification No. 14, making false entries in Department records; Specification No. 15, unlawful imprisonment, and Specification No. 16, official misconduct.

Respondent's General DefensesLack of Formal Complaints Following Arrests

Respondent's counsel emphasized on cross examination that no formal complaints were made to IAB or the Civilian Complaint Review Board by any of the arrestees following what they contended were false arrests (Tr. 105, 715, 929-30). The Court does not find this fact dispositive or even particularly illuminating. The fact that they did not lodge formal complaints does not mean that no misconduct occurred. Some of them already had police records and might have wanted to minimize their contact with law enforcement. Some of them might have just wanted to move on with their lives, especially as the cases against them ultimately were dismissed or they received violation-level pleas. They might choose this course rather than begin a lengthy complaint or litigation process.

Further, several of the individuals explained their reasons for not pursuing complaints. Person A stated that he did not pursue a complaint because he did not want to make possible trouble for his son who was in the Police Academy (Tr. 568; DX 10 at pp. 13, 16). Diaz testified that he could not afford an attorney and felt the dismissal was justice enough (Tr. 715). Saez did not complain to the Department but filed a lawsuit and received a \$20,000 settlement from the City (Tr. 929-30). Finally, Zhuang was barred from bringing a lawsuit by virtue of his pleading guilty to disorderly conduct (Tr. 105).

Lack of Motive

Respondent asserted that he had no motive to engage in flaking. He insisted that he was not motivated by overtime and suggested that if he was motivated by money, it would have been easier to simply pocket prerecorded buy money (Tr. 2108). Respondent further testified that there were no penalties for undercovers who failed at making a buy as long as one made an honest effort and that increased buy numbers did not accelerate the eighteen-month track to detective (Tr. 2129).

Respondent's testimony as to the lack of competitiveness among undercovers to get buys contradicted the testimony of other witnesses. Robert Minca, Respondent's own witness and now-retired supervisor, testified that he believed all undercovers wanted a high number of buys for "personal satisfaction" and that there was an "ongoing competition" to see who could get the most buys. Minca further noted that unproductive undercovers were utilized less and had fewer opportunities for overtime (Tr. 1583-86). Minca's testimony echoed that of Anderson, who testified that undercovers were expected to make a certain number of buys in order to stay in their command (Tr. 403). Even Respondent testified that an officer might be transferred somewhere that they could "blend in" better if they were having difficulty making buys (Tr. 2237).

While there may have been no per se penalties for a failed buy, or bonuses for a successful buys, it is reasonable that all undercovers would have wanted to make a healthy number of buys, be perceived as successful and avoid the possibility of being transferred. Even taking Respondent at his word that he was not motivated by opportunities for overtime, it is still implausible that Respondent, or any undercover, would have been unconcerned with his buy statistics and believed that a good effort was enough. As such, any undercover would have motive to engage in flaking as a guaranteed way to increase buy numbers.

Respondent Reported Observed Misconduct

Respondent's counsel emphasized that Respondent actually reported other officers that engaged in misconduct. In 2007, Respondent told a supervisor that he was not sure that Anderson, whom Respondent was ghosting at the time, truly made a buy as reported. Respondent explained that he had doubts because the alleged seller was wearing earbuds, which was uncommon as drug dealers generally wanted to be able to listen for police or cars approaching. He told a supervising sergeant that something seemed off about the buy (Tr. 2007-09). The allegation was reported to IAB but ultimately unsubstantiated (Tr. 1158-59, 2009).

The Court does not find that this one report outweighs the other credible evidence that Respondent engaged in drug flaking. Moreover, Respondent might not have wanted to be associated with what he considered to be more obvious flaking due to the earbuds, especially if he was engaging in more covert flaking at the same time in 2007.

The other occasions that counsel emphasized do not speak to the drug flaking issue. In one instance, Respondent expressed doubts about an individual he identified as a dealer and after viewing him again, told his supervisor and the DA's Office that the apprehended individual was not the right guy (Tr. 1786-87, 2038-39). On another occasion, Respondent observed a new undercover kiss a drug dealer, thereby taking a hit of crack, which was dangerous for all sorts of reasons. Respondent noted that his supervisor observed this as well and that when questioned, he reported what had transpired (Tr. 1551, 1923-25).

These instances of reporting are quite different than the alleged flaking situations. In the misidentification situation, Respondent corrected his own mistake. In the other case, the entire field team, including his supervisor, also saw the situation transpire. He simply cooperated with an investigation into what already was known.

In sum, these instances of reporting are not particularly enlightening to the tribunal. It does not follow that Respondent's allegation of Anderson flaking on one occasion means that Respondent never could have engaged in flaking himself.

Case No. 2010-2753

This case arises out of Respondent's financial and personal relationship with his second cousin, Person D. They did not grow up together but reconnected at Respondent's mother's 80th birthday party in the spring of 2008. Person D told Respondent that he worked as a mortgage broker and they discussed interest rates on Respondent's existing investment properties. They exchanged phone numbers and developed a social relationship, attending concerts and going to dinner together (Tr. 1710-12, 2139).

In the summer of 2008, Respondent told Person D that he was thinking of starting a landscaping business. Person D said that he could help him get set up as he had recently formed a company called Jackal Inc. for another person who then had backed out. Person D offered to let Respondent become the president of this company and said that he would waive his typical \$9,000 fee for a corporation start-up. Respondent agreed and gave Person D all his personal information, including his social security number. When Person D suggested that Respondent open Home Depot and Lowe's credit cards to build up the business's credit, Respondent signed credit applications, which Person D filled out (Tr. 1716-22).

In late August 2008, Person D asked for Respondent's help in getting a car loan. explaining that he wanted to get rid of his white Maserati as it was difficult to maintain but he had bad credit. Respondent felt indebted to Person D for help getting the corporation established and agreed to help. On August 28, 2008, Respondent and Person D went to Masada Auto Sales, where they met with the finance manager [REDACTED] and another employee, [REDACTED]

[REDACTED] The Masada

staff was quite familiar with Person D, as he had bought several cars there before. Ultimately, a Retail Installment Contract was executed with Alphera Financial Services, listing Respondent as the purchaser of a 2005 Maserati (Tr. 1351, 1728-31, 1735; RX C, contract). The contract reflected a \$10,000 down payment and an unpaid balance of \$84,762.50. No down payment, however, actually was made. Respondent's name appeared in the "Buyer's Signature" field, but the car thereafter was in Person D's possession (Tr. 1301, 1309-10, 1343, 1412, 1419).

In September 2008, a detective assigned to the 102 Squad contacted Respondent after a complainant, resident in the 102 Precinct, complained that Person D was using his identity to purchase goods from Home Depot. At least one charged delivery was sent to Respondent's address. Respondent provided the detective with Person D's address and phone number and stated that he would assist them in getting Person D to cooperate. He then reached out to Person D, who eventually turned himself in and was arrested. Respondent admitted that he utilized Department computers and ran multiple searches for Person D following Person D's arrest (Tr. 1277-80, 1284, 1405, 1738-39, 1742, 1743-46, 1755, 2154, 2188-89).

After Person D was arrested, Respondent was contacted by Person D's sister, who informed him that the new Maserati might be in his name, as Person D had previously conned family and friends into putting cars in their names for his use. At this point, Respondent retrieved the car keys from Person D's friend, found the purchase agreement in the glove compartment, and parked the Maserati at his command. He and Person D returned the car to Masada a few days later. Respondent tried to work out an arrangement where Person D would continue making payments until the car was resold, but Person D never made a payment. Respondent then complained to the lender, Alphera, that he was a victim of identity fraud and filled out an affidavit stating this, but never admitted that he did not file a police report (Tr. 1285, 1311, 1748-50, 1753-54, 2191-97; RX D, Alphera).

affidavit). The loan never was formally unwound and negatively impacted Respondent's credit (Tr. 2197-98, 2200).

Respondent subsequently was modified as a result of his association with Person D. After turning in his firearms and shield, he contacted Lieutenant Edward Rodriguez of IAB that night to inform him that he was in possession of several additional firearms he forgot about in midst of the trauma (Tr. 1760-62). These guns were not listed on Respondent's Department force record (Tr. 1316).

Respondent is charged in this case with (i) the crime of intentionally falsifying the business records of an enterprise by executing a credit application in the purchase of a motor vehicle on August 28, 2008, that fraudulently represented that a cash down payment was made; (ii) wrongfully utilizing Department computers to make unauthorized inquiries, unrelated to the business of the Department, regarding Person D; (iii) knowingly associating with Person D when he was reasonably believed to be engaged in or to have engaged in criminal activities between September 16, 2008, and November 13, 2009; and (iv) failing and neglecting to report the acquisition of three firearms, as required by the Patrol Guide.

Findings and Analysis

Specification No. 1 –Falsifying Business Records

Here, Respondent is charged with the Penal Law offense of falsifying business records in the second degree, Penal Law § 175.05 (1). The Department was required to show that, with intent to defraud, Respondent made or caused a false entry in the business records of an enterprise, in that he represented that a \$10,000 cash down payment was made to the seller in the Alphera contract.

There are two issues – whether Respondent signed the purchase contract and whether he intentionally made fraudulent representations regarding the down payment. Respondent denies both.

The Department's handwriting expert found that the signature at the bottom of the purchase contract was that of Respondent, based on a comparison of that signature to other documents that were known to have been signed by Respondent (Tr. 1209-30; DX 14 & 15, handwriting analysis lab report with explanation). Respondent admitted that the signature appears to be his signature. However, he denied signing the document and alleged that a forgery scheme occurred where Respondent signed another document, a credit application, which unbeknownst to him then was placed over the purchase contract, using a carbon form, making the two signatures appear the same (RS at p. 17; Tr. 2200).

Respondent presented no tangible evidence of forgery, only his speculation. Further, Respondent's statements about what he signed were not entirely consistent. The IAB investigator, Detective Michael Corbett, testified that Respondent told him at a non-custodial, informal interview following Pers. D's arrest that he signed several pieces of paper, including a credit application, but was not sure if he signed a financial agreement (Tr. 1304). Respondent stated on direct examination that he did not sign a purchase contract but also testified, "I just remember the credit application and I remember signing something else. . . . I don't know what they were" (Tr. 1734). However, on cross examination, he asserted, "Just to be clear, I filled out a loan application, and that was it" (Tr. 2185). It is difficult for the tribunal to take Respondent at his word that he definitively did not sign this document when his statements as to what he signed kept changing to bolster his forgery argument.

However, even assuming Respondent did sign the document, perhaps not reading it or knowing exactly what he was signing, the Department proffered no evidence that Respondent intentionally defrauded the lender by representing that he had made a fictitious down payment.

The down payment is one of numerous typeface numbers contained in the body of the contract. Respondent testified that he knew nothing about a down payment and there was no contradictory testimony. Moreover, the ancillary evidence supports Respondent's claim that he was conned into a fraudulent transaction. Corbett corroborated Respondent in testifying that Person D was found to be not a credible person, with a history of conning his friends and family (Tr. 1285-88). Person D, not Respondent, is the one known to have a relationship with Masada and therefore in more of a position to collude with them to falsify the agreement (Tr. 1293, 1351-52). Further, Respondent's latent prints were not found in the car and Respondent took out no insurance on the car (Tr. 1421, 1748-49). In other words, Respondent had no other discernible connection to this vehicle. The Department's view is that he was a sophisticated con artist, so he had to have known that if the car was in his name, it would ruin his credit if the loan was ignored. Yet that is what he seemed to do. It supports the view that he did not know the car was in his name, and thus did not intend to defraud Alphera.

Because the Department has put forth no testimony or other evidence demonstrating that Respondent intentionally misrepresented or falsified the Retail Installment Contract as to the nonexistent down payment, the Court finds him Not Guilty of Specification No. 1.

Specification No. 2 Utilizing Department Computers Without Authorization

Respondent admitted to running "three or four" searches for Person D using a Department computer shortly after Person D was arrested (Tr. 1755). This query was unauthorized

and unrelated to any official Department business Respondent had. Respondent therefore is found Guilty.

Specification No. 3 –Criminal Association

The Department alleged that following Person D's arrest, from September 16, 2008, when Respondent confirmed through the computer inquiries that Person D had been arrested, Respondent maintained a social and financial relationship with him until November 2009. As a police officer, Respondent was obligated not to associate with individuals reasonably believed to be engaged in, likely to engage in, or to have engaged in criminal activities (Patrol Guide § 203-10 [2][c]).

Respondent had been informed by the 102 Squad as to Person D's illegal activities (Tr. 1740- 43). Respondent admitted, though, that following Person D's arrest, Person D called him and they took the car back to Masada together and met with the owner (Tr. 1753-54). Respondent explained that he was advised it would be better for his credit if he could come to an agreement with Person D and the dealership so he tried to work out an arrangement where Person D would make payments on the car on his behalf (Tr. 2193-97). He further testified that he "still believed" in Person D even after he got out of jail because they were family, and that they went back and forth for about a month before he realized Person D was "stringing [him] along" (Tr. 2196-97).

This testimony demonstrates that Respondent continued to speak with and associate with Person D for at least a month following Respondent's conversation with the 102 Squad detective and Person D's arrest. While Respondent might have believed this was necessary to avoid more damage to his credit score, he was not absolved of his obligations under the Patrol Guide. If he needed to communicate with Person D there were other ways to do it, such as through counsel and a legally formalized payment plan. Thus he is found Guilty.

Specification No. 4 – Failure to Report Firearms Acquisition

Immediately following Respondent's modification, the firearms listed on his Department force record were collected by IAB. Respondent reached out to IAB that same evening and informed Rodriguez that he was in possession of several additional firearms. These firearms were not listed on Respondent's record and the paperwork pertaining to these firearms had not been distributed properly according to the Patrol Guide (Tr. 1316-18, 1762).

Respondent is charged with wrongfully failing and neglecting to report these firearms acquisitions to the Department, as required by Patrol Guide § 204-10 (6)-(9). Corbett, however, explained that Respondent's supervisor, acting in the role of desk officer, confirmed that he approved all Respondent's paperwork for these firearms. Corbett further testified that Respondent completed all steps for recording the acquisition of these firearms except for the final step of breaking apart the paperwork and sending it to Albany (Tr. 1318-19). That final step is to be completed by a "clerical member," not the member of service who owns the firearm. (18)-(20). As such, in testifying that all steps were completed except for this final distribution, the Department's own witness confirmed that Respondent did not violate (6)-(9).

Corbett explained that as a non-traditional command without sufficient clerical staff or a desk officer or platoon commander, any Narcotics supervisor could fill these roles for the purposes of the Patrol Guide procedure. He further testified that the supervisor stated he directed Respondent to distribute the paperwork himself (Tr. 1318, 1486). Whether this order was sufficient, however, is irrelevant to the specification as written. Respondent is charged with failing to report the firearms to the Department. He did report them to the Department. He is charged with being derelict regarding Patrol Guide § 204-10 (6)-(9). In fact, Respondent apparently complied with all those steps: showing the bill of sale to a supervisor; have the gun tested by the Department; "prepare" the state report "and complete sections one through four;"

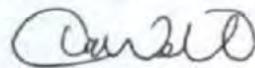
and give the form to the supervisor. Respondent is Not Guilty of the specification the Department wrote.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on September 29, 2000. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Lying about the sale of drugs, causing the imprisonment of innocent individuals and falsifying Department paperwork is an extraordinary ethical and professional failure in even one instance. See Case No. 85399/09 (Sept. 21, 2012) (terminating from employment Delicias de Mi Tierra detective for conspiring with other members of team to fabricate the facts regarding arrest of four innocent individuals for drug sales); Matter of McDonough v. Bratton, 251 A.D.2d 51 (1st Dept. 1998) (in light of officer lying about illegal search, seizure and arrest, as well as consistent pattern of lying to supervisors, prosecutors and other officials concerning the arrest, termination was neither shockingly unfair nor disproportionate). Respondent has been found Guilty of this most serious act of corruption in three instances. Accordingly, the Court recommends that Respondent be DISMISSED from the Department.

Respectfully submitted,



David S. Weisel

Assistant Deputy Commissioner – Trials

APPROVED

SEP 21 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
DETECTIVE ADOLPH OSBACK
TAX REGISTRY NO. 927305
DISCIPLINARY CASE NOS. 2010-2753 & 2010-3188

Respondent was appointed to the Department on September 29, 2000. There are no records on his Central Personnel Index of recent formal evaluations. He has received one medal for Meritorious Police Duty.

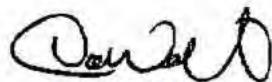
[REDACTED]

[REDACTED]

[REDACTED]

Respondent has no prior formal disciplinary history.

For your consideration.



David S. Weisel

Assistant Deputy Commissioner – Trials